



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R07-OAR-2015-0270; FRL-9929-05-Region 7]

Partial Approval and Disapproval of Air Quality State

Implementation Plans (SIP); State of Nebraska; Infrastructure

SIP Requirements for the 2008 Ozone National Ambient Air Quality Standard.

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove elements of a State Implementation Plan (SIP) submission from the State of Nebraska addressing the applicable requirements of Clean Air Act (CAA) section 110 for the 2008 National Ambient Air Quality Standards (NAAQS) for Ozone (O₃), which requires that each state adopt and submit a SIP to support implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by EPA. These SIPs are commonly referred to as "infrastructure" SIPs. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management

program are adequate to meet the state's responsibilities under the CAA. EPA is proposing to disapprove Nebraska's SIP as it relates to section 110 with respect to visibility, for the 2008 O₃ NAAQS.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R07-OAR-2015-0270, by one of the following methods:

1. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
2. *Email:* crable.gregory@epa.gov.
3. *Mail:* Mr. Gregory Crable, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 11201 Renner Boulevard, Lenexa, Kansas 66219.
4. *Hand Delivery or Courier:* Deliver your comments to Mr. Gregory Crable, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 11201 Renner Boulevard, Lenexa, Kansas 66219.

Instructions: Direct your comments to Docket ID No. EPA-R07-OAR-2015-0270. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including

any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through <http://www.regulations.gov> or email information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and should be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at <http://www.regulations.gov> or in hard copy at U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219 from 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Crable, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, KS 66219; *telephone number:* (913) 551-7391; *fax number:* (913) 551-7065; *email address:* crable.gregory@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional information by addressing the following questions:

- I. What is a Section 110(a)(1) and (2) Infrastructure SIP?
- II. What are the Applicable Elements Under Sections 110(a)(1) and (2)?
- III. What is EPA's Approach to the Review of Infrastructure SIP Submissions?
- IV. What is EPA's Evaluation of How the State Addressed the Relevant Elements of Sections 110(a)(1) and (2)?
- V. What Action is EPA Proposing?
- VI. Statutory and Executive Order Review

I. What is a Section 110(a)(1) and (2) Infrastructure SIP?

Section 110(a)(1) of the CAA requires, in part, that states make a SIP submission to EPA to implement, maintain and enforce each of the NAAQS promulgated by EPA after reasonable notice and public hearings. Section 110(a)(2) includes a list of specific elements that such infrastructure SIP submissions must address. SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. These SIP submissions are commonly referred to as "infrastructure" SIPs.

II. What are the Applicable Elements Under Sections 110(a)(1) and (2)?

On March 12, 2008, EPA promulgated a revised NAAQS for ozone based on 8-hour average concentrations. The level of the 2008 8-hour ozone NAAQS (hereafter the 2008 O₃ NAAQS) was revised from 0.08 parts per million (ppm) to 0.075 ppm (73 FR 16436).

For the 2008 O₃ NAAQS, states typically have met many of the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. Nevertheless, pursuant to section 110(a)(1), states must review and revise, as appropriate, their existing SIPs to ensure that the SIPs are adequate to address the 2008 O₃ NAAQS. To assist states in meeting this statutory requirement, EPA issued guidance on September 13, 2013 (2013 Guidance), addressing the

infrastructure SIP elements required under section 110 (a) (1) and (2) for the 2008 O₃ NAAQS¹. EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (prevention of significant deterioration) (PSD)), New Source Review for nonattainment areas, and construction and modification of all stationary sources; (D) Interstate and international transport; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas; (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection; (K) Air quality and modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.

III. What is EPA's Approach to the Review of Infrastructure SIP Submissions?

EPA is acting upon the February 11, 2013, SIP submission from Nebraska that addresses the infrastructure requirements of CAA sections 110(a) (1) and 110(a) (2) for the 2008 O₃ NAAQS. The requirement for states to make a SIP submission of this type

¹ Stephen D. Page, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, "Guidance on Infrastructure State Implementation Plan (SIP) Elements Under Clean Air Act Sections 110(a)(1) and 110(a)(2)," Memorandum to EPA Regional Air Division Directors, Regions I-X, September 13, 2013.

arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as "infrastructure SIP" submissions. Although the term "infrastructure SIP" does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as "nonattainment SIP" or "attainment plan SIP" submissions to address the nonattainment planning requirements of part D of title I of the CAA, "regional haze SIP" submissions required by EPA rule to

address the visibility protection requirements of CAA section 169A, and nonattainment new source review permit program submissions to address the permit requirements of CAA, title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.² EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

² For example: section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that “each” SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the Act, which specifically address nonattainment SIP requirements³. Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years, or in some cases three years, for such designations to be promulgated⁴. This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA

³ See, e.g., “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule,” 70 FR 25162, at 25163 – 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

⁴ EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, e.g., that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit “a plan” to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action⁵. Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the

⁵ See, e.g., “Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting,” 78 FR 4339 (January 22, 2013) (EPA’s final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA’s 2008 PM_{2.5} NSR rule), and “Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM_{2.5} NAAQS,” (78 FR 4337) (January 22, 2013) (EPA’s final action on the infrastructure SIP for the 2006 PM_{2.5} NAAQS).

entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission⁶.

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states' attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants, for example because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS⁷.

⁶ On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee's December 14, 2007 submittal.

⁷ For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the "applicable requirements" of section 110(a)(2). Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the

context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way. Therefore, EPA has adopted an approach under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements⁸. EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance)⁹. EPA developed the 2013 Guidance document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within the 2013 guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic

⁸ EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

⁹ “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant in the context of infrastructure SIP submissions¹⁰. The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2).

Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's SIP appropriately

¹⁰ EPA's September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d 7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by this litigation (which culminated in the Supreme Court's recent decision, 134 S.Ct. 1584), EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state's CAA obligations.

addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (e.g., whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). However they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in sections 110(a)(2)(C), (D)(i)(II), and (J) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and New Source Review (NSR) pollutants, including greenhouse gases (GHGs). By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with

respect to the 2012 PM_{2.5} NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's SIP meets basic structural requirements. For example, section 110(a)(2)(C) includes, *inter alia*, the requirement that states have a program to regulate minor new sources. Thus, EPA evaluates whether the state has an EPA-approved minor NSR program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (*i.e.*, already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); (ii) existing provisions related

to “director’s variance” or “director’s discretion” that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA’s “Final NSR Improvement Rule,” 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (“NSR Reform”). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions¹¹. It is important to note that EPA’s approval of a state’s infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA’s approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the general requirements of section 110(a)(1) and the list of

¹¹ By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

elements in 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for

any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II).

With respect to element[s] C and J, EPA interprets the CAA to require each state to make an infrastructure SIP submission for a new or revised NAAQS that demonstrates that the air agency has a complete PSD permitting program meeting the current requirements for all regulated NSR pollutants. The requirements of element D(i)(II) may also be satisfied by demonstrating the air agency has a complete PSD permitting program correctly addressing all regulated NSR pollutants. Nebraska has shown that it currently has a PSD program in place that covers all regulated NSR pollutants, including greenhouse gases (GHGs).

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of PSD permitting requirements to GHG emissions. *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S.Ct. 2427. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). In order to act

consistently with its understanding of the Court's decision pending further judicial action to effectuate the decision, the EPA is not continuing to apply EPA regulations that would require that SIPs include permitting requirements that the Supreme Court found impermissible. Specifically, EPA is not applying the requirement that a state's SIP-approved PSD program require that sources obtain PSD permits when GHGs are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g. 40 CFR 51.166(b)(48)(v)). EPA anticipates a need to revise Federal PSD rules in light of the Supreme Court opinion. In addition, EPA anticipates that many states will revise their existing SIP-approved PSD programs in light of the Supreme Court's decision. The timing and content of subsequent EPA actions with respect to the EPA regulations and state PSD program approvals are expected to be informed by additional legal process before the United States Court of Appeals for the District of Columbia Circuit. At this juncture, EPA is not expecting states to have revised their PSD programs for purposes of infrastructure SIP submissions and is only evaluating such submissions to assure that the state's program correctly addresses GHGs consistent with the Supreme Court's decision.

At present, EPA has determined the Nebraska's SIP is sufficient to satisfy elements C, D(i)(II), and J with respect to GHGs because the PSD permitting program previously approved by EPA into the SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT. Although the approved Nebraska's PSD permitting program may currently contain provisions that are no longer necessary in light of the Supreme Court decision, this does not render the infrastructure SIP submission inadequate to satisfy elements C, (D)(i)(II), and J. The SIP contains the necessary PSD requirements at this time, and the application of those requirements is not impeded by the presence of other previously-approved provisions regarding the permitting of sources of GHGs that EPA does not consider necessary at this time in light of the Supreme Court decision. Accordingly, the Supreme Court decision does not affect EPA's proposed approval of Nebraska's infrastructure SIP as to the requirements of elements C, D(i)(II), and J.

Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow

EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a state’s SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA¹². Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions¹³. Significantly, EPA’s determination that an action on a state’s infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on an

¹² For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions,” 74 FR 21639 (April 18, 2011).

¹³ EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,” 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA section 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action¹⁴.

IV. What is EPA's Evaluation of How the State Addressed the Relevant Elements of Sections 110(a)(1) and (2)?

EPA Region 7 received Nebraska's infrastructure SIP submission for the 2008 O₃ standard on February 11, 2013. The SIP submission became complete as a matter of law on August 11, 2013. EPA has reviewed Nebraska's infrastructure SIP submission and the applicable statutory and regulatory authorities and provisions referenced in those submissions or referenced in Nebraska's SIP. Below is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(2) for the 2008 O₃ NAAQS.

(A) Emission limits and other control measures: Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques,

¹⁴ See, e.g., EPA's disapproval of a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

schedules for compliance, and other related matters as needed to implement, maintain and enforce each NAAQS¹⁵.

The State of Nebraska's statutes and Air Quality Regulations authorize the Nebraska Department of Environmental Quality (NDEQ) to regulate air quality and implement air quality control regulations. Section 81-1504 of the Nebraska Revised Statutes authorizes NDEQ to act, among other things, as the state air pollution control agency for all purposes of the CAA and to develop comprehensive programs for the prevention, control and abatement of new or existing pollution to the air of the state. Air pollution is defined in Section 81-1502 of the Nebraska Revised Statutes as the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such duration as are or may tend to be injurious to human, plant, or animal life, property, or the conduct of business.

Section 81-1505(1) of the Nebraska Revised Statutes authorizes the Nebraska Environmental Quality Council (EQC) to adopt and promulgate rules which set air standards that will

¹⁵ The specific nonattainment area plan requirements of section 110(a)(2)(I) are subject to the timing requirements of section 172, not the timing requirement of section 110(a)(1). Thus, section 110(a)(2)(A) does not require that states submit regulations or emissions limits specifically for attaining the 2010 SO₂ NAAQS. Those SIP provisions are due as part of each state's attainment plan, and will be addressed separately from the requirements of section 110(a)(2)(A). In the context of an infrastructure SIP, EPA is not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the state's SIP has basic structural provisions for the implementation of the NAAQS.

protect public health and welfare. The EQC is also authorized to classify air contaminant sources according to levels and types of discharges, emissions or other characteristics.

The 2008 O₃ NAAQS specified in 40 CFR part 50.10 was proposed and adopted into Nebraska title 129 chapter 4, section 005 of the Nebraska Administrative Code, by the EQC on June 20, 2013, with an effective date of December 9, 2013.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that the Nebraska SIP adequately addresses the requirements of section 110(a)(2)(A) for the 2008 O₃ NAAQS and is proposing to approve this element of the February 11, 2013, SIP submission.

(B) Ambient air quality monitoring/data system: Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, section 81-1505(12)(o) of the Nebraska Revised Statutes provides the enabling authority necessary for Nebraska to fulfill the requirements of section 110(a)(2)(B). This provision gives the EQC the authority to promulgate rules and regulations concerning the monitoring of

emissions. Nebraska complies with 40 CFR part 50, appendix P with regards to the regulatory monitoring, compiling, and analysis of data on ambient air quality relative to the 2008 ozone 8-hour NAAQS. The Air Quality Division within NDEQ implements these requirements. Along with their other duties, the monitoring program within NDEQ's Air Compliance and Enforcement Program collects air monitoring data, quality assures the results, and reports the data. In accordance with the requirements of 40 CFR part 58 appendix D, section 4.1(a), Nebraska operates four O₃ monitors, three in the Omaha MSA and one in the Lincoln MSA.

NDEQ develops and administers the ambient air monitoring network plan and submits it annually to EPA for approval, including the plan for its O₃ monitoring network, as required by 40 CFR 58.10. Prior to submission to EPA, Nebraska makes the plans available for public review on NDEQ's web site. See, http://deq.ne.gov/Publica.nsf/Pubs_Air_Amb.xsp, for NDEQ's 2014 Ambient Air Monitoring Network Plan. This Plan includes, among other things, the locations for the O₃ monitoring network. On February 9, 2015, EPA approved Nebraska's 2014 ambient air network monitoring plan. NDEQ also conducts five-year monitoring network assessments, including the O₃ monitoring network, as required by 40 CFR 58.10(d). Title 129, chapter 4, section 005

of the NAC requires that attainment with the O₃ standard be determined in accordance with the applicable Federal regulations in 40 CFR part 50, appendix S. Nebraska submits air quality data to EPA's Air Quality System (AQS) quarterly, pursuant to the provisions of work plans developed in conjunction with EPA grants to the state.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that the Nebraska SIP adequately addresses the requirements of section 110(a)(2)(B) for the 2008 O₃ NAAQS and is proposing to approve this element of the February 11, 2013, SIP submission.

(C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources): Section 110(a)(2)(C) requires states to include the following three elements in the SIP: (1) a program providing for enforcement of all SIP measures described in section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS (i.e., state-wide permitting of minor sources); and (3) a permit

program to meet the major source permitting requirements of the CAA (for areas designated as attainment or unclassifiable for the NAAQS in question)¹⁶.

(1) *Enforcement of SIP Measures.* With respect to enforcement of requirements of the SIP, the Nebraska statutes provide authority to enforce the requirements of section 81-1504(1) of the Nebraska Revised Statutes provide authority for NDEQ to enforce the requirements of the Nebraska Environmental Protection Act, and any regulations, permits, or final compliance orders issued under the provisions of that law. In addition, section 81-1504(7) authorizes NDEQ to issue orders prohibiting or abating discharges of waste into the air and requiring the modification, extension or adoption of remedial measures to prevent, control, or abate air pollution. Section 81-1507 authorizes NDEQ to commence an enforcement action for any violations of the Environmental Protection Act, any rules or regulations promulgated thereunder, or any orders issued by NDEQ. This enforcement action can not only seek civil penalties, but also require that the recipient take corrective action to address the violation. See section 81-1507(1) and 81-1508.02.

¹⁶ As discussed in further detail below, this infrastructure SIP rulemaking will not address the Kansas program for nonattainment area related provisions, since EPA considers evaluation of these provisions to be outside the scope of infrastructure SIP actions.

Section 81-1508.01 provides for criminal penalties for knowing or willful violations of the statute, regulations or permit conditions, in addition to other acts described in that section.

(2) *Minor New Source Review*. Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction and modification of stationary sources to protect the NAAQS. With respect to smaller state-wide minor sources (Nebraska's major source permitting program is discussed in (3) below), Nebraska has a program under title 129, chapter 17 of the NAC that requires such sources to first obtain a construction permit from NDEQ. The permitting process is designed to ensure that new and modified sources will not interfere with NAAQS attainment. NDEQ has the authority to require the source applying for the permit to undergo an air quality impact analysis. If NDEQ determines that emissions from a constructed or modified source interfere with attainment of the NAAQS, it may deny the permit until the source makes the necessary changes to obviate the objections to the permit issuance. See chapter 17, sections 008 and 009 of the NAC.

EPA has determined that Nebraska's minor new source review (NSR) program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of NAAQS pollutants. EPA has also determined that certain provisions of the state's minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act

likely do not meet all the requirements found in EPA's regulations implementing that provision. See 40 CFR 51.160 - 51.164. EPA previously approved Nebraska's minor NSR program into the SIP, and at the time there was no objection to the provisions of this program. See 37 FR 10842 (May 31, 1972) and 60 FR 372 (January 4, 1995). Since then, the state and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Nebraska's infrastructure SIP for the 2008 O₃ NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. In this action, EPA is not proposing to approve or disapprove the state's existing minor NSR program to the extent that it is inconsistent with EPA's regulations governing this program. EPA has maintained that the CAA does not require that new infrastructure SIP submissions correct any defects in existing EPA-approved provisions of minor NSR programs in order for EPA to approve the infrastructure SIP for element (C) (e.g., 76 FR 41076 - 76 FR 41079).

(3) *Prevention of Significant Deterioration (PSD) permit program.* Nebraska also has a program approved by EPA as meeting the requirements of part C, relating to prevention of significant deterioration of air quality. In order to demonstrate that Nebraska has met this sub-element, this PSD program must cover requirements not just for the 2008 O₃ NAAQS, but for all other regulated NSR pollutants as well.

Nebraska's implementing rule, title 129, chapter 19, Prevention of Significant Deterioration of Air Quality, incorporates the relevant portions of the Federal rule, 40 CFR 52.21 by reference. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements. EPA will act on NSR reform submittals through a separate rulemaking process. For Nebraska, we have previously approved Nebraska's NSR reform rules for attainment areas, see 76 FR 15852, March 22, 2011.

The Nebraska SIP also contains a permitting program for major sources and modifications in nonattainment areas (see title 129, chapter 17, section 013). This section is currently not applicable to Nebraska because all areas of Nebraska are currently in attainment with the NAAQS. Even if it were applicable, the SIP's discussion of nonattainment areas is not addressed in this rulemaking (see discussion of the section 110(a)(2)(I) requirements for nonattainment areas, below).

With respect to the PSD program, title 129, chapter 19, of the NAC provides for the permitting of construction of a new major stationary source or a major modification of an existing major stationary source. Further, chapter 19, section 010 of the NAC establishes threshold emissions for establishing whether the construction project is a major source of regulated NSR pollutants, including but not limited to O₃.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that the Nebraska SIP adequately addresses the requirements of section 110(a)(2)(C) for the 2008 O₃ NAAQS and is proposing to approve this element of the February 11, 2013, SIP submission.

(D) Interstate and international transport: Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); Prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II). Section 110(a)(2)(D)(i)(I) requires SIPs to include adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance, of any NAAQS in another state. Section 110(a)(2)(D)(i)(II) requires SIPs to include adequate provisions prohibiting any

source or other type of emissions activity in one state from interfering with measures required of any other state to prevent significant deterioration of air quality or to protect visibility.

With regard to 110(a)(2)(D)(i)(I) - prongs 1 and 2, EPA is not proposing action at this time. The Agency plans to take action on this portion of the SIP consistent with Consent Decree 4:14-cv-03198-YGR.

With respect to the PSD requirements of section 110(a)(2)(D)(i)(II) - prong 3, EPA notes that Nebraska's satisfaction of the applicable infrastructure SIP PSD requirements for attainment/unclassifiable areas of the 1997 and 2006 PM_{2.5} NAAQS have been detailed in the section addressing section 110(a)(2)(C). As discussed above for element (C)(3), EPA has previously approved Nebraska's NSR reform rules for attainment areas, and, as previously stated, Nebraska currently has no nonattainment areas (See 76 FR 15852, March 22, 2011). EPA also notes that the proposed action in that section related to PSD is consistent with the proposed approval related to PSD for section 110(a)(2)(D)(i)(II). Therefore, EPA is proposing to approve the PSD requirements of section 110(a)(2)(D)(i)(II) - prong 3.

EPA is proposing to disapprove Nebraska's SIP as it relates to section 110(a)(2)(D)(i)(II) with respect to visibility, or

“prong 4” of the requirements of section 110(a)(2)(D). In its SIP submittal, Nebraska refers to its submittal of a SIP revision in July 2011 addressing the regional haze requirements. An approved regional haze SIP that fully meets the regional haze requirements in 40 CFR 51.308 would satisfy the requirements of section 110(a)(2)(D)(i)(II) for visibility protection as such a SIP would ensure that emissions from the state will not interfere with measures required to be included in other state SIPs to protect visibility. EPA has not, however, fully approved Nebraska’s Regional Haze SIP.

On July 6, 2012, after reviewing Nebraska’s submittal of a Regional Haze SIP, EPA published the “Approval, Disapproval and Promulgation of Implementation Plans; State of Nebraska; Regional Haze State Implementation Plan; Federal Implementation Plan for Best Available Retrofit Technology Determination; Final Rule” (77 FR 40150). In that action, EPA partially approved the SIP revision as meeting the applicable regional haze requirements set forth in sections 169A and 169B of the Act and in the Federal regulations codified at 40 CFR 51.308, and the requirements of 40 CFR part 51, subpart F and appendices V and Y. EPA disapproved the SO₂ BART determinations for units 1 and 2 of the Gerald Gentleman Station (GGS) because they do not comply with EPA’s regulations. EPA also disapproved Nebraska’s long-term strategy insofar as it relied on the deficient SO₂ BART

determination at GGS. Instead, EPA finalized a FIP relying on the Transport Rule as an alternative to BART for SO₂ emissions from GGS to address these deficiencies. EPA approved Nebraska's NO_x BART determination at GGS as SIP-strengthening and approved the CSAPR FIP as satisfying the requirements for the Regional Haze Rule with respect to NO_x. Given this, EPA cannot approve Nebraska's SIP as meeting the prong 4 requirements based on the absence of a fully approved Regional Haze SIP.

In the absence of a fully approved Regional Haze SIP, a state may meet the requirements of prong 4 by showing that its SIP contains adequate provisions to prevent emission from within the state from interfering with other states' measures to protect visibility. See, e.g. 76 FR 8326 (February 14, 2011). Nebraska did not, however, provide a demonstration in its infrastructure SIP that emissions within its jurisdiction do not interfere with other states' plans to protect visibility.

Section 110(a)(2)(D)(ii) also requires that the SIP insure compliance with the applicable requirements of sections 126 and 115 of the CAA, relating to interstate and international pollution abatement, respectively. Section 126(a) of the CAA requires new or modified sources to notify neighboring states of potential impacts from sources within the state. Although Nebraska sources have not been identified by EPA as having any interstate or international impacts under section 126 or section

115 in any pending actions relating to the 2008 O₃ NAAQS, the Nebraska regulations address abatement of the effects of interstate pollution. Title 129, chapter 14, section 010.03 of the NAC requires NDEQ, after receiving a complete PSD permit application, to notify EPA, as well as officials and agencies having cognizance where the proposed construction is to occur. This includes state or local air pollution control agencies and the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification. Finally, we believe that Nebraska could use the same statutory authorities previously discussed, primarily section 81-1505 of the Nebraska Revised Statutes, to respond to any future findings with respect to the 2008 O₃ NAAQS.

Section 115 of the CAA authorizes EPA to require a state to revise its SIP under certain conditions to alleviate international transport into another country. There are no final findings under section 115 of the CAA against Nebraska with respect to any air pollutant. Thus, the state's SIP does not need to include any provisions to meet the requirements of section 115.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and

regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA is not proposing action on section 110(a)(2)(D)(i)(I) - prongs 1 and 2 and is disapproving 110(a)(2)(D)(i)(II) - prong 4. However, EPA believes that Nebraska has the adequate infrastructure needed to address, 110(a)(2)(D)(i)(II) - prong 3 and 110(a)(2)(D)(ii) for the 2008 O₃ NAAQS and is proposing to approve the February 11, 2013, submission regarding the 2008 O₃ infrastructure SIP requirements for those elements as indicated above.

(E) Adequate authority, resources, implementation, and oversight: Section 110(a)(2)(E) requires that SIPs provide for the following: (1) necessary assurances that the state (and other entities within the state responsible for implementing the SIP) will have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements that the state comply with the requirements relating to state boards, pursuant to section 128 of the CAA; and (3) necessary assurances that the state has responsibility for ensuring adequate implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) Section 110(a)(2)(E)(i) requires states to establish that they have adequate personnel, funding and authority. With

respect to adequate authority, we have previously discussed Nebraska's statutory and regulatory authority to implement the 2008 O₃ NAAQS, primarily in the discussion of section 110(a)(2)(A) above. Neither Nebraska nor EPA has identified any legal impediments in the state's SIP to implementation of the NAAQS.

With respect to adequate resources, NDEQ asserts that it has adequate personnel to implement the SIP. State statutes provide NDEQ the authority to establish bureaus, divisions and/or sections to carry out the duties and powers granted by the Nebraska state law to address the control of air pollution, to be administered by full-time salaried, bureau, division or section chiefs. See Nebraska Revised Statutes section 81-1504(14). NDEQ's Air Quality Division is currently divided into the Permitting Section, the Compliance Section, and the Program Planning and Development Unit.

With respect to funding, the Nebraska statutes require the EQC to establish various fees for sources, in order to fund the reasonable costs of implementing various air pollution control programs. For example, section 81-1505(12)(e) of the Nebraska Revised Statutes requires the EQC to establish a requirement for sources to pay fees sufficient to pay the reasonable direct and indirect costs of developing and administering the air quality operating permit program. These costs include overhead charges

for personnel, equipment, buildings and vehicles; enforcement costs; costs of emissions and ambient monitoring; and modeling analyses and demonstrations. See Nebraska Revised Statutes section 81-1505.04(2)(b). Similarly, section 81-1505(12)(a) requires the EQC to establish application fees for air contaminant sources seeking to obtain a permit prior to construction.

Section 81-1505.05 of the Nebraska Revised Statutes provides that all fees collected pursuant to section 81-1505.04 be credited to the "Clean Air Title V Cash Fund" to be used solely to pay for the direct and indirect costs required to develop and administer the air quality permit program. Similarly, section 81-1505.06 provides that all fees collected pursuant to section 81-1505(12) be deposited in the "Air Quality Permit Cash Fund."

Nebraska uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, sections 103 and 105 of the Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among others, implement the SIP.

(2) Conflict of interest provisions - section 128. Section 110(a)(2)(E)(ii) requires that each state SIP meet the requirements of section 128, relating to representation on state

boards and conflicts of interest by members of such boards.

Section 128(a)(1) requires that any board or body which approves permits or enforcement orders under the CAA must have at least a majority of members who represent the public interest and do not derive any "significant portion" of their income from persons subject to permits and enforcement orders under the CAA. Section 128(a)(2) requires that members of such a board or body, or the head of an agency with similar powers, adequately disclose any potential conflicts of interest.

On October 21, 2014, EPA approved Nebraska's SIP revision addressing section 128 requirements. For a detailed analysis concerning Nebraska's section 128 provisions, see EPA's approval of Nebraska's 2008 Lead infrastructure SIP (79 FR 62832).

(3) With respect to assurances that the state has responsibility to implement the SIP adequately when it authorizes local or other agencies to carry out portions of the plan, section 81-1504(18) of the Nebraska Revised Statutes grants NDEQ the authority to encourage local units of government to handle air pollution problems within their own jurisdictions. NDEQ may delegate, by contract with governmental subdivisions which have adopted air pollution control programs, the enforcement of state-adopted air pollution control regulations within a specified region surrounding the jurisdictional area of the governmental subdivision. See section 81-1504(23). However,

the Nebraska statutes also retain authority in NDEQ to carry out the provisions of state air pollution control law. Section 81-1504(1) gives NDEQ "exclusive general supervision" of the administration and enforcement of the Nebraska Environmental Protection Act. In addition, section 81-1504(4) designates NDEQ as the air pollution control agency for the purposes of the CAA.

The State of Nebraska relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control. NDEQ oversees the activities of these local agencies to ensure adequate implementation of the plan. NDEQ utilizes sub-grants to the local agencies to provide adequate funding, and as an oversight mechanism. EPA conducts reviews of the local program activities in conjunction with its oversight of the state program.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS and relevant statutory and regulatory authorities and provisions referenced in these submissions or referenced in Nebraska's SIP, EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(E) for the 2008 O₃ NAAQS submitted and is proposing to approve the February 11, 2013 submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

(F) Stationary source monitoring system: Section

110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. Each SIP shall require the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources, to monitor emissions from such sources. The SIP shall also require periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and requires that the state correlate the source reports with emission limitations or standards established under the CAA. These reports must be made available for public inspection at reasonable times.

To address this element, section 81-1505(12)(o) of the Nebraska Revised Statutes gives the EQC the authority to promulgate rules and regulations for air pollution control, including requirements for owner or operator testing and monitoring of emissions. It also gives the EQC the authority to promulgate similar rules and regulations for the periodic reporting of these emissions. See section 81-1505(12)(l). Title 129 chapter 34, section 002 of the NAC incorporates various EPA reference methods for testing source emissions, including

methods for O₃. The Federal test methods in 40 CFR part 60, appendix A are referenced in title 129, chapter 34 section 002.02.

The Nebraska regulations also require that all Class I and Class II operating permits include requirements for monitoring of emissions. See title 129, chapter 8, sections 004.01 and 015 of the NAC. Furthermore, title 129, chapter 34, section 001 of the NAC allows NDEQ to order an emissions source to make or have tests made to determine the rate of contaminant emissions from the source whenever NDEQ has reason to believe that the existing emissions from the source exceed the applicable emissions limits.

The Nebraska regulations also impose reporting requirements on sources subject to permitting requirements. See title 129, chapter 6, section 001; chapter 8, sections 004.03 and 015 of the NAC. Nebraska makes all monitoring reports submitted as part of Class I or Class II permit a publicly available document. Although sources can submit a claim of confidentiality for some of the information submitted, Nebraska regulations specifically exclude emissions data from being entitled to confidential protection. See title 129, chapter 7, section 004 of the NAC. Nebraska uses this information to track progress towards maintaining the NAAQS, developing control and maintenance

strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(F) for the 2008 O₃ NAAQS submitted and is proposing to approve the February 11, 2013, submission regarding the infrastructure SIP requirements for this element.

(G) Emergency authority: Section 110(a)(2)(G) requires SIPs to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in section 303 of the CAA), and to include contingency plans to implement such authorities as necessary.

Section 81-1507(4) of the Nebraska Revised Statutes states that whenever the Director of NDEQ finds that an emergency exists requiring immediate action to protect the public health and welfare, he or she may issue an order requiring that such action be taken as the Director deems necessary to meet the emergency. Title 129, chapter 38, section 003 of the NAC states that the conditions justifying the proclamation of an air

pollution alert, air pollution warning, or air pollution emergency exist whenever the Director determines that the accumulation of air pollutants in any place is attaining or has attained levels which could, if such levels are sustained or exceeded, lead to a substantial threat to the health of persons. This regulation also establishes action levels for various air pollutants. The action levels (which include "Air Pollution Alert," "Air Pollution Warning," and "Air Pollution Emergency") and associated contingency measures vary depending on the severity of the concentrations. Appendix I to title 129 of the NAC provides an Emergency Response Plan with actions to be taken under each of the severity levels. These steps are designed to prevent the excessive build-up of air pollutants to concentrations which can result in imminent and substantial danger to public health. Both the regulation at chapter 38 and the Emergency Response Plan are contained in the Federally approved SIP.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in that submission or referenced in Nebraska's SIP, EPA believes that the Nebraska SIP adequately addresses section 110(a)(2)(G) for

the 2008 O₃ NAAQS submitted and is proposing to approve the February 11, 2013, submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

(H) Future SIP revisions: Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

As discussed previously, section 81-1504 of the Nebraska Revised Statutes authorizes NDEQ to regulate air quality and implement air quality control regulations. It also authorizes NDEQ to act as the state air pollution control agency for all purposes of the CAA. Section 81-1505(1) gives the EQC the authority to adopt and promulgate rules which set air standards that will protect public health and welfare. This authority includes the authority to revise rules as necessary to respond to a revised NAAQS.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has adequate authority to address section 110(a)(2)(H)

for the 2008 O₃ NAAQS submitted and is proposing to approve this element in regard to the February 11, 2013, submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

(I) Nonattainment areas: Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of part D of the CAA, relating to SIP requirements for designated nonattainment areas.

As noted earlier, EPA does not expect infrastructure SIP submissions to address subsection (I). The specific SIP submissions for designated nonattainment areas, as required under CAA title I, part D, are subject to different submission schedules than those for section 110 infrastructure elements. Instead, EPA will take action on part D attainment plan SIP submissions through a separate rulemaking governed by the requirements for nonattainment areas, as described in part D.

(J) Consultation with government officials, public notification, PSD and visibility protection: Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) section 121, relating to interagency consultation regarding certain CAA requirements; (2) section 127, relating to public notification of NAAQS

exceedances and related issues; and (3) part C of the CAA, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, the SIP should provide a process for consultation with general-purpose local governments, designated organizations of elected officials of local governments, and any Federal Land Manager having authority over Federal land to which the SIP applies. Section 81-1504(3) authorizes NDEQ to advise and consult and cooperate with other Nebraska state agencies, the Federal government, other states, interstate agencies, and with affected political subdivisions, for the purpose of implementing its air pollution control responsibilities. Nebraska also has appropriate interagency consultation provisions in its preconstruction permit program. See, e.g., title 129, chapter 14 section 010 of the NAC (requiring NDEQ to send a copy of a notice of public comment on construction permit applications to any state or local air pollution control agency; the chief executives of the city and county in which the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification).

(2) With respect to the requirements for public notification in section 127, the infrastructure SIP should provide citations to regulations in the SIP requiring the air agency to regularly notify the public of instances or areas in which any NAAQS are exceeded; advise the public of the health hazard associated with such exceedances; and enhance public awareness of measures that can prevent such exceedances and of ways in which the public can participate in the regulatory and other efforts to improve air quality.

Title 129, chapter 38 of the NAC, discussed previously in connection with the state's authority to address emergency episodes at element (G), contains provisions for public notification of elevated ozone and other air pollutant levels. Appendix I to title 129 of the NAC includes measures which can be taken by the public to reduce concentrations. In addition, information regarding air pollution and related issues, is provided on an NDEQ website, <http://www.deq.state.ne.us/NDEQSite.nsf/AirDivSecProg?OpenView&Start=1&ExpandView&Count=500>. NDEQ also prepares an annual report on air quality in the state which is available to the public on its website, at <http://www.deq.state.ne.us/Publica.nsf/c4afc76e4e077e11862568770059b73f/a12a5ada6cce1c1686257a47004e0633!OpenDocument>.

(3) With respect to the applicable requirements of part C of the CAA, relating to prevention of significant deterioration of air quality and visibility protection, we previously noted in the discussion of section 110(a)(2)(C) (relating to enforcement of control measures) how the Nebraska SIP meets the PSD requirements, incorporating the Federal rule by reference. Regarding the prevention of significant deterioration requirements, EPA previously approved Nebraska's PM_{2.5} PSD program as found at 79 FR 45108. On January 22, 2013, the U.S. Court of Appeals for the District of Columbia vacated and remanded the provisions at 40 CFR 51.166(k)(2) and 52.21(k)(2) concerning implementation of the PM_{2.5} SILs and vacated the provisions at 40 CFR 51.166(i)(5)(i)(c) and 52.21 (i)(5)(i)(c) (adding the PM_{2.5} SMCs) that were promulgated as part of the October 20, 2010, rule, Prevention of Significant Deterioration (PSD) for Particulate Matter less than 2.5 Micrometers (PM_{2.5})-Increments, Significant Impact Levels and Significant Monitoring Concentrations, 75 CFR 64864. Consistent with the court's ruling, on June 27, 2013, Nebraska submitted a request to not include the SIP provisions relating the Significant Impact Levels (SILs) and Significant Monitoring Concentrations (SMCs).

With respect to the visibility component of section 110(a)(2)(J), Nebraska stated in its 2008 O₃ infrastructure SIP submittals that the "Visibility Protection" requirements of

chapter 43 of title 129 of the Nebraska Administrative Code met part C visibility requirements of element J. The "Visibility Protection" requirements of chapter 43 were submitted by Nebraska for incorporation into the Nebraska SIP on November 8, 2011, and will be addressed in a separate rulemaking.

EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA. However, when EPA establishes or revises a NAAQS, these visibility and regional haze requirements under part C do not change. EPA believes that there are no new visibility protection requirements under part C as a result of a revised NAAQS. Therefore, there are no newly applicable visibility protection obligations pursuant to element J after the promulgation of a new or revised NAAQS. As such, EPA is proposing to find that Nebraska's SIP meets the visibility requirements of element J with respect to the 2008 O₃ NAAQS as there are no new applicable requirements triggered by the 2008 O₃ NAAQS.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that

Nebraska has met the applicable requirements of section 110(a)(2)(J) for the 2008 O₃ NAAQS in the state and is therefore proposing to approve this element of the February 11, 2013, submission.

(K) Air quality and modeling/data: Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict the effects on ambient air quality of any emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Nebraska has authority to conduct air quality modeling and report the results of such modeling to EPA. Section 81-1504(5) provides NDEQ with the authority to encourage, participate in, or conduct studies, investigations, research and demonstrations relating to air pollution and its causes and effects. As an example of regulatory authority to perform modeling for purposes of determining NAAQS compliance, the regulations at title 129, chapter 19, section 019 provide for the use of EPA-approved air quality models (e.g., those found in 40 CFR part 51, appendix W) for PSD construction permitting. If the use of these models is inappropriate, the model may be modified or an alternate model may be used with the approval of NDEQ and EPA.

The Nebraska regulations also give NDEQ the authority to require that modeling data be submitted for analysis. Title 129, chapter 19, section 021.02 states that upon request by NDEQ, the

owner or operator of a proposed source or modification must provide information on the air quality impact of the source or modification, including all meteorological and topographical data necessary to estimate such impact.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(K) for the 2008 O₃ NAAQS and is proposing to approve the February 11, 2013, submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

(L) Permitting Fees: Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority, as a condition of any permit required under the CAA, to cover the cost of reviewing and acting upon any application for such a permit, and, if the permit is issued, the costs of implementing and enforcing the terms of the permit. The fee requirement applies until a fee program established by the state pursuant to title V of the CAA, relating to operating permits, is approved by EPA.

Section 81-1505 of the Nebraska Revised States provides authority for NDEQ to collect permit fees, including title V fees. For example, section 81-1505(12)(e) requires that the EQC

establish fees sufficient to pay the reasonable direct and indirect of developing and administering the air quality permit program. Nebraska's title V program, including the fee program addressing the requirements of the Act and 40 CFR 70.9 relating to title V fees, was approved by EPA on October 18, 1995 (60 FR 53872).

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(L) for the 2008 O₃ NAAQS and is proposing to approve the February 11, 2013, submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

(M) Consultation/participation by affected local entities: Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

Section 81-1504(5) of the Nebraska Revised Statutes gives NDEQ the authority to encourage local governments to handle air pollution problems within their respective jurisdictions and at the same time provide them with technical and consultative assistance. NDEQ is also authorized to delegate the enforcement of air pollution control regulations down to governmental

subdivisions which have adopted air pollution control programs. As discussed previously, NDEQ currently relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control.

In addition, as previously noted in the discussion about section 110(a)(2)(J), Nebraska's statutes and regulations require that NDEQ consult with local political subdivisions for the purposes of carrying out its air pollution control responsibilities.

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(M) for the 2008 O₃ NAAQS and is proposing to approve the April 3, 2008, submission regarding the 2008 O₃ infrastructure SIP requirements for this element.

V. What Action is EPA Proposing?

EPA is proposing to approve the infrastructure SIP submissions from Nebraska which address the requirements of CAA sections 110(a)(1) and (2) as applicable to the 2008 O₃ NAAQS. Specifically, EPA is proposing to approve the following infrastructure elements, or portions thereof:

110(a)(2)(A), (B), (C), (D)(i)(II)- prong 3, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). As discussed in each applicable section of this rulemaking, EPA is not proposing action on section 110(a)(2)(D)(i)(I)- prongs 1 and 2 and section 110(a)(2)(I)- Nonattainment Area Plan or Plan Revisions under part D. And finally, EPA is proposing to disapprove 110(a)(2)(D)(i)(II) - prong 4, as it relates to the protection of visibility.

Based upon review of the state's infrastructure SIP submissions and relevant statutory and regulatory authorities and provisions referenced in the submission or referenced in Nebraska's SIP, EPA believes that Nebraska has the infrastructure to address all applicable required elements of sections 110(a)(1) and (2) (except otherwise noted) to ensure that the 2008 O₃ NAAQS are implemented in the state.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

VI. Statutory and Executive Order Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as

meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Statutory Authority

The statutory authority for this action is provided by section 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Sulfur Dioxide, Reporting and recordkeeping requirements.

Dated: June 1, 2015.

Mark Hague,
Acting Regional Administrator,
Region 7.

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